



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 121025586-2603-01]

RIN 0648-XC326

Listing Endangered or Threatened Species: 90-Day Finding on a Petition to Delist the Southern Resident Killer Whale, Request for Information

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of finding; request for information.

SUMMARY: We, the National Marine Fisheries Service (NMFS), announce a 90-day finding on a petition to delist the Southern Resident killer whale (Orcinus orca) Distinct Population Segment (DPS) under the Endangered Species Act (ESA). The Southern Resident killer whale DPS was listed as endangered under the ESA in 2005. We find that the petition viewed in the context of information readily available in our files presents substantial scientific information indicating the petitioned action may be warranted. We are hereby initiating a status review of Southern Resident killer whales to determine whether the petitioned action is warranted and to examine the application of the DPS policy. To ensure the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species.

DATES: Scientific and commercial information pertinent to the petitioned action and DPS review must be received by [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit information or data by any of the following methods.

Electronic Submissions: Submit all electronic information via the Federal eRulemaking Portal <http://www.regulations.gov>. To submit information via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter “NOAA-NMFS-” in the keyword search. Locate the document you wish to provide information on from the resulting list and click on the “Submit a Comment” icon to the right of that line.

Mail or hand-delivery: Protected Resources Division, NMFS, Northwest Region, Protected Resources Division, 7600 Sand Point Way NE. Attention—Donna Darm, Assistant Regional Administrator.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous).

Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Lynne Barre, NMFS Northwest Region, (206) 526-4745; Marta Nammack, NMFS Office of Protected Resources, (301) 427-8469.

SUPPLEMENTARY INFORMATION:

ESA Statutory Provisions and Policy Considerations

On August 2, 2012, we received a petition submitted by the Pacific Legal Foundation on behalf of the Center for Environmental Science Accuracy and Reliability, Empresas Del Bosque, and Coburn Ranch to delist the endangered Southern Resident killer whale DPS under the ESA. Copies of the petition are available upon request (see ADDRESSES, above).

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable within 90 days of receipt of a petition to list or delist a species as threatened or endangered, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the Federal Register (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates that the petitioned action may be warranted, as is the case here, we are required to promptly commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, within 12 months of receipt of the petition we conclude the review with a determination that the petitioned action is not warranted, or a proposed determination that the action is warranted. Under specific facts, we may also issue a determination that the action is warranted but precluded. Because the finding at the 12-month stage is based on a comprehensive review of all best available information, as compared to the more limited scope of review at the 90-day stage, which focuses on information set forth in the petition

and information readily available in our files, this 90-day finding does not prejudice the outcome of the status review.

Under the ESA, the term “species” means a species, a subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532(16)). A joint NMFS-USFWS policy clarifies the Services' interpretation of the phrase “Distinct Population Segment,” or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment qualifies as a DPS under the ESA: Discreteness of the population segment in relation to the remainder of the species, and, if discrete, the significance of the population segment to the species.

A species is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: (1) the present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

Under section 4(a)(1) of the ESA and the implementing regulations at 50 CFR 424.11(d), a species shall be removed from the list if the Secretary of Commerce determines, based on the best scientific and commercial data available after conducting a

review of the species' status, that the species is no longer threatened or endangered because of one or a combination of the section 4(a)(1) factors. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) Recovery. The principal goal of the Services is to return listed species to a point at which protection under the ESA is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error (50 CFR 424.11(d)).

ESA implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define “substantial information,” in the context of reviewing a petition to list, delist, or reclassify a species, as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition (1) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available

information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Judicial decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action may be warranted. As a general matter, these decisions hold that a petition need not establish a “strong likelihood” or a “high probability” that a species is or is not either threatened or endangered to support a positive 90-day finding.

To make a 90-day finding on a petition to list, delist, or reclassify a species, we evaluate whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles (such as citing published and peer reviewed articles and studies done in accordance with valid methodologies), unless we have specific information in our files that indicates that the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be disregarded at the 90-day finding

stage, so long as it is reliable and provides basis for us to find that a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating that the species may meet the ESA's requirements for delisting is not required to make a positive 90-day finding.

Background

After receiving a petition to list Southern Resident killer whales as threatened or endangered under the ESA in 2001 (CBD, 2001), we formed a Biological Review Team (BRT) to assist with a status review (NMFS, 2002). After conducting the status review, we determined that listing Southern Resident killer whales as a threatened or endangered species was not warranted because Southern Resident killer whales did not constitute a species as defined by the ESA (67 FR 44133; July 1, 2002). Because of the uncertainties regarding killer whale taxonomy (i.e., whether killer whales globally should be considered as one species or as multiple species and/or subspecies), we announced we would reconsider the taxonomy of killer whales within 4 years. Following the determination, the Center for Biological Diversity, and other plaintiffs, challenged our “not warranted” finding under the ESA in U.S. District Court. The U.S. District Court for the Western District of Washington issued an order on December 17, 2003, which set aside our “not warranted” finding and remanded the matter to us for redetermination of whether the Southern Resident killer whales should be listed under the ESA (Center for Biological Diversity v. Lohn, 296 F. Supp. 2d. 1223 (W.D. Wash. 2003)). The court found that where there is “compelling evidence that the global Orcinus orca taxon is inaccurate,” the agency may not rely on “a lack of consensus in the field of taxonomy regarding the precise, formal taxonomic redefinition of killer whales.” As a result of the

court's order, we co-sponsored a Cetacean Taxonomy workshop in 2004, which included a special session on killer whales, and reconvened a BRT to prepare an updated status review document for Southern Resident killer whales (NMFS, 2004).

The BRT agreed that the Southern Resident killer whale population likely belongs to an unnamed subspecies of resident killer whales in the North Pacific, which includes the Southern and Northern Residents, as well as the resident killer whales of Southeast Alaska, Prince William Sound, Kodiak Island, the Bering Sea and Russia (but not transients or offshores). The BRT concluded that the Southern Resident killer whale population is discrete and significant with respect to the North Pacific resident taxon and therefore should be considered a DPS. In addition, the BRT conducted a population viability analysis which modeled the probability of species extinction under a range of assumptions. Based on the findings of the status review and an evaluation of the factors affecting the DPS, we published a proposed rule to list Southern Resident killer whales as threatened on December 22, 2004 (69 FR 76673). After considering public comments on the proposed rule and other available information, we reconsidered the status of the Southern Resident killer whale DPS and issued a final rule to list the Southern Resident killer whale DPS as endangered on November 18, 2005 (70 FR 69903).

Following the listing, we designated critical habitat, completed a recovery plan, and conducted a 5-year review for Southern Resident killer whales. We issued a final rule designating critical habitat for the Southern Resident killer whales November 29, 2006 (71 FR 69055). The designation includes three specific areas: (1) the Summer Core Area in Haro Strait and waters around the San Juan Islands; (2) Puget Sound; and (3) the Strait of Juan de Fuca, which comprise approximately 2,560 square miles (square km) of

Puget Sound. The designation excludes areas with water less than 20 feet (m) deep relative to extreme high water. After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for Southern Resident killer whales on January 24, 2008 (73 FR 4176). We have continued working with partners to implement actions in the recovery plan. In March 2011, we completed a five-year review of the ESA status of Southern Residents killer whales concluding that no change was needed in their listing status, and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS 2011).

Petition Finding

On August 2, 2012, we received a petition submitted by the Pacific Legal Foundation on behalf of the Center for Environmental Science Accuracy and Reliability, Empresas Del Bosque, and Coburn Ranch to delist the endangered Southern Resident killer whale DPS under the ESA. The petitioners contend that the killer whale DPS does not constitute a listable unit under the ESA because NMFS is without authority to list a DPS of a subspecies. The petitioners also contend that there is no scientific basis for the designation of the unnamed North Pacific Resident subspecies of which the Southern Resident killer whales are a purported DPS. They conclude that the listing of the Southern Resident killer whale DPS is illegal, and therefore, that NMFS should delist the DPS.

The petition focuses entirely on the DPS issue and does not include any information regarding the five section 4(a)(1) factors or status of population. The petitioners provide both a legal argument regarding the DPS determination under the ESA and also a scientific argument regarding the biological basis for the DPS

determination. There is no information presented regarding past and present numbers and distribution of the species, the threats faced by the species, or the status of the species over all or a significant portion of its range.

The petition does present new information regarding genetic samples and data analysis pertinent to the question of discreteness and the DPS determination. The source of the new information comes primarily from a scientific peer reviewed journal article published subsequent to the listing (Pilot et al., 2010) which includes information regarding breeding between different ecotypes of killer whales (i.e., offshores and transients). The petitioners also cite new articles regarding killer whale vocalizations, and review different types of information considered by the BRT and presented in the status review (NMFS, 2004).

As described above, the standard for determination of whether a petition includes substantial information is whether the amount of information presented provides a basis for us to find that it would lead a reasonable person to believe that the measure proposed in the petition may be warranted. We find the analysis of additional genetic samples and publication of new peer reviewed scientific journal articles regarding the taxonomy of killer whales meets this standard, based on the information presented and referenced in the petition, as well as all other information readily available in our files. Because the petition presents substantial scientific evidence indicating that the petition may be warranted we do not address petitioner's legal argument now but rather will do so as appropriate at the 12 month determination.

We note that information and results, similar to those presented in Pilot et al. (2010), were available at the time of the Status Review (NMFS, 2004), Cetacean Taxonomy Workshop (Reeves et al., 2004), DPS determination, and listing decision. In addition to the information presented in the petition, we have data from new genetic samples and peer reviewed scientific journal articles (e.g., Morin et al., 2010, Ford et al., 2011) readily available in our files regarding taxonomy and breeding behavior of killer whales that address the discreteness question and the DPS determination. We are also soliciting any new information available to inform the status review. We will consider all of the available information in our determination of whether the delisting of the Southern Resident killer whale DPS is warranted.

Information Solicited

To ensure that our status review is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the Southern Resident killer whale DPS. The petition focuses on both the legal and biological aspects of the DPS determination, and the status review will also focus on the DPS determination. We are therefore soliciting new information relevant to the factors considered in the DPS determination.

References Cited

The complete citations for the references used in this document can be obtained by contacting NMFS (See ADDRESSES and FOR FURTHER INFORMATION CONTACT) or on our web page at:

Authority: 16 U.S.C. 1531 et seq.

Dated: November 20, 2012.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs.

[FR Doc. 2012-28762 Filed 11/26/2012 at 8:45 am; Publication Date: 11/27/2012]